COMMENT.

We are in receipt of the text of the opinion handed down on January 6, 1899, by the Supreme Court of the Hawaiian Islands, in reference to the petition of Wong Tuk and certain other Chinese for a writ of *habeas corpus*. Petitioners were holders of *bona fide* permits issued to them by the Hawaiian Government before the signing, on the 7th day of July, 1898, of the Joint Resolution of Annexation, by President McKinley; some of them, indeed, had resided in the Islands previously, and had left with the intention of returning. On their arrival at Hawaii from China early in December they were arrested by the Collector-General of Customs, who made return to the writ, that he and the United States Chinese Inspector had examined them and ascertained that none of them had complied with the requirements of the United States statutes respecting the exclusion of Chinese. The Newlands Resolution of Annexation provides, among other things: "There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything therein contained, shall be allowed to enter the United States from the Hawaiian Islands." Another clause provided that, "Until Congress shall provide for the government of such Islands, all the civil, judicial and military powers exercised by the officers of the existing government in said Islands shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned." Accordingly the President, by proclamation made on August 12, 1898, continued the existing officers of the Hawaiian Government in office. The Resolution further provided: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished shall remain in force until the Congress of the United States shall otherwise determine, excepting such legislation as is inconsistent with this Joint Resolution." Upon a petition of the same general nature, Chief Justice Judd had shortly before decided that although the clause of the resolution forbidding further Chinese immigration had virtually repealed the Hawaiian statutes, which allowed a restricted immigration, yet under the circumstances of the case, he was of the opinion that Congress had not intended the clause to have a retrospective effect and render invalid these permits. See, especially, *Chew Yeong* v. *U. S.*, 112 U. S., p. 536. He was strengthened in this opinion by the fact that the United States statutes respecting Chinese immigration are not self-executory and are not capable of being enforced where there are no legally authorized officials to enforce them. In the present case the chief justice adheres to this view, while his two associates on the bench disagree with him upon these points, and further deny that the Hawaiian court has any jurisdiction in the premises. The question, they say, is one purely federal, arising under the laws and treaties of the United States, and can therefore be taken cognizance of only by a federal court, established by Congress under Art. III of the Constitution. To sustain this deduction, they quote at length from the decision of *Ableman* v. *Booth* and *U. S.* v. *Booth*, 21 How. 506. But it is difficult to discover in what way that decision is in point, if at all analogous, since in those cases the courts of a regularly established state asserted a paramount jurisdiction to those of the United States court, upon a question undoubtedly federal. Indeed, it would seem to be a much fairer inference, deducible from the words themselves of the Resolution and the consequent proclamation of the President, that it was the intention of Congress to erect the courts of the Islands into a sort of territorial court, until

further action by Congress, thus preventing a manifest failure of justice in many cases during the "interregnum." Such an interpretation of the Resolution would give the court jurisdiction of some federal questions, at least, if not of all that might be likely to arise. See *Endleman* v. *U. S.*, 86 Fed. 456, 458, *The Grapeshot*, 9 Wall. 129, *McAllister* v. *U. S.*, 141 U. S. 174, and cases there cited, particularly *Benner* v. *Porter*, 9 How. 235, 242, 243. We understand that the court, in an earlier case, assumed that it had jurisdiction in admiralty, notwithstanding the Resolution. But there is nothing in the present decision to lead one to infer that the court had in mind the distinction suggested by Chief Justice Marshall, that while admiralty cases and cases arising under the laws and treaties of the United States were both federal in *nature* and both within the purview of Art. III of the Constitution, yet admiralty *cases* were by no means cases arising under the laws and treaties of the United States. See *Am. Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 544.

A case involving a novel state of facts upon the question of suits by third parties to a contract who are not privy to the consideration has recently been passed upon by the Court of Appeals of New York. The defendant in the case, in order to contest a clause in the will of his uncle, Samuel J. Tilden, and to procure funds for that purpose, promised one Robert D. Buchanan that if he would procure him the necessary funds, he (defendant), in case of success in the suit, would become responsible for the payment to Mrs. Buchanan of the sum of $50,000. Mrs. Buchanan was the adopted daughter of the testator, and not entitled by law to share in the distribution of the fund that would become intestate estate if the present defendant should succeed in having the particular clause declared invalid. Buchanan furnished the money, and defendant, successful in the suit, paid Mrs. Buchanan $8,150, but no more. In an action by her to recover the balance of the $50,000, the Court of Appeals *held*, in affirmance of the trial court, and in reversal of the Supreme Court, that she could recover in her own name. The relation of plaintiff to testator gave her an equitable and moral, though not strictly legal, right to share in "this scheme to attack the will," and share in the distribution. Moreover, it was the bounden duty of her husband, if opportunity offered, to provide for his wife against the day when he became incapacitated by disease or death to do so. The court considered these as controlling features in the case, and that it was, therefore, against the evidence to say that the agreement was not a contract for the wife's support, such as she could herself sue upon. Examined in the light of precedent, moreover, plaintiff has an undoubted right to sue, and this not alone upon the broad principle laid down in *Lawrence v. Fox*, 20 N. Y. 268, to the effect that an action will lie in a promise by defendant, upon valid consideration, in favor of a plaintiff, not privy to the consideration; but upon the ground of the decision in *Dalton* v. *Poole*, 1 Ventris 318-332, decided in England in the reign of Charles II. That was a case where the promise was made to a father to pay his daughter £1,000, on consideration that he would forbear to cut timber on land descendable to defendant, in order to raise a portion for the daughter. It was *held*, that the daughter could maintain suit on the promise. This decision was attacked by Lord Blackburn in *Twaddle* v. *Aikins*, 101 Eng. C. L. R. 393, but has never been overruled, and is still good law, it seems, even in England, where the doctrine of *Lawrence* v. *Fox*, supra, is not accepted. "We can see," say the court, "no valid distinction between the relation of parent and child and husband and wife as affording an ample consideration for covenants enuring to the benefit of the child or wife." Justice Gray dissenting (Parker, Ch. J., and O'Brien, J., concurring), thinks the rule of *Durnherr* v. *Rau*, 135 N. Y. 219, applies, that the promisee must have a *legal* interest that the covenant be performed in favor of a third party claiming performance; and that the mere duty of a husband to provide for his wife did not furnish such legal interest. But it is to be noticed that the majority of the court profess to decide this case on its peculiar facts; and renders no opinion as to whether the mere relation of husband and wife constitutes a consideration sufficient to enable the plaintiff to maintain an action on the covenant.